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The Honest Leadership and Open Government Act of 2007:

How to Comply with New Lobbying and Ethics Rules

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October 11, 2007

Introduction

- » Do H.Res. 6 and S. 1 portend a new ethics era?
- » What has changed? What has not changed?
- » How do the new rules fit with the old rules?
- » Timelines
- » Compliance and tracking. Kelley Drye can help.

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New Rules & Laws

S. 1/
H.Res. 6

- » Gift ban (effective now)
- » Privately-funded travel restrictions (effective now)
- » Lobbying disclosure (starts for post-1/1/2008 activities)
- » Bundling disclosure (effective mid-2008)
- » Earmarks and other limited benefits (effective now)
- » Post-employment restrictions (staggered effectiveness; no later than 1/1/2008)
- » Miscellaneous provisions (various effective dates)

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New Categories of Regulated Entities

S. 1/
H.Res. 6

- » "Registered lobbyist, an agent of a foreign principal, or a private entity that retains or employs a registered lobbyist or agency of a foreign principal"
 - » Universe subject to new gift and travel restrictions (although travel pre-approval applies to all)
- » "Each person or organization who is registered or required to register [as a lobbyist employer under the LDA], **and** each employee who is required to be listed as a lobbyist [in LDA reports]"
 - » Universe subject to new semiannual political activity reporting and gift/travel certification requirements

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Summary Gift/Travel Matrix

If you are a lobbyist/entity:	If you are not a lobbyist/entity:
<ul style="list-style-type: none"> » Gift ban applies, including at the less than \$10 level » Gift rule exceptions apply (except where lobbyists excluded) » Can't arrange or be on travel "segment" » However, non-lobbyists in lobbying entity can arrange and conduct "one-day trips," with Ethics Committee pre-approval 	<ul style="list-style-type: none"> » Pre-existing gift limits apply (single gift limit of \$49.99; aggregate annual limit of \$100) » Gift rule exceptions apply » Can arrange, fund, and join in travel » Pre-existing rules for longer trips remain in force, but pre-approval requirements apply

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Gift Ban

House	Senate	Lobbyists and Private Sector
<ul style="list-style-type: none"> » H.Res. 6 bans gifts and travel from lobbyists and private entities that retain or employ lobbyists, unless the gift or travel falls within one of the gift rule exceptions 	<ul style="list-style-type: none"> » S. 1 matches H.Res. 6 » Also includes a new gift rule exception for "bona fide constituent events" 	<ul style="list-style-type: none"> » Imposes compliance obligations on lobbyists and lobbying firms (not just Members and staff) » Felony criminal liability for a lobbyist or firm that knowingly and corruptly provides an illegal gift or travel

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Gift Rule Exceptions Still Pertain

S Rule XXXV
H Rule XXV

- » Categories of gifts that are acceptable or permitted under an exception
 - » Food or refreshments
 - » Recreational activities/entertainment
 - » Attendance at events (e.g., widely attended or constituent)
 - » Personal friendship/gifts from relative
 - » Items of little intrinsic value, such as a baseball cap
 - » Campaign contributions/fundraisers
 - » Training
 - » Other

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Gift Rule Exceptions (cont'd)

S Rule XXXV
H Rule XXV

- » Food and refreshments offered
 - » During fundraiser sponsored by a political committee
 - » Incident to outside business activities
 - » Incident to official site visit in a group setting (House)
 - » Under or incident to other gift rule exceptions
 - » At training session in "interest" of House or Senate if food and refreshments are "integral"
 - » Of nominal value offered other than as part of a meal
 - » As an element of permitted travel or other event
 - » Personal hospitality at home

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Gift Rule Exceptions (cont'd)

S Rule XXXV
H Rule XXV

» Recreational activities

- » Permitted as part of free attendance at widely-attended event if entertainment is an “integral” part of the event
- » Conceivably permitted as part of gift of travel with Ethics Committee pre-approval, if overall event is not “substantively recreational in nature”
- » Non-lobbyists/lobbying firms may provide, subject to gift limits
- » Ticket valuation
 - » House
 - » Generally face value, or highest face value if no face value
 - » Senate
 - » Generally face value, or highest face value if no face value (unless other, lower value approved in advance)

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Gift Rule Exceptions (cont'd)

S Rule XXXV
H Rule XXV

» Widely attended event

- » Conference, symposium, forum, legislative briefing, reception, dinner, panel discussion, reception, and similar function
- » Standards for “wide attendance”
 - » Reasonable expectation of 25 or more persons, excluding Members and staff
 - » Attendance open to a given industry or profession, or represents range of persons interested in subject
- » Invitation comes from sponsor
- » Attendance related to Member's/staff official duties
- » Local travel only and generally no souvenirs

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Gift Rule Exceptions (cont'd)

S Rule XXXV
H Rule XXV

- » Personal friendship exception
 - » No pre-existing friendship “requirement”
 - » History of the relationship, including any previous gifts, is nonetheless central
 - » Whether a tax deduction was sought or the gift is treated as business expense
 - » Gave similar gifts to other Members or staff
 - » Can include personal hospitality
 - » \$250 limit from non-family members, unless Ethics Committee pre-approval

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Gift Rule Exceptions (cont'd)

S Rule XXXV
H Rule XXV

- » Campaign contributions/fundraisers
 - » Lawful campaign contributions (direct and in-kind)
 - » Fundraising events
 - » Bona fide event “sponsored by” a political committee
 - » Sponsoring political committee subject to FEC in-kind contribution limits and rules for food and beverages

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Gift Rule Exceptions (cont'd)

S Rule XXXV
H Rule XXV

» Training

- » Must be “in interest of” House or Senate
- » Can include food and refreshments, only if
 - » Furnished to all attendees
 - » Integral part of training
- » Now being used in conjunction with provision of food and refreshments of a nominal value, other than as part of a meal

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Gift Rule Exceptions (cont'd)

S Rule XXXV
H Rule XXV

- » Other acceptable gifts
 - » Informational materials sent to the Member
 - » Awards and prizes – open to the public
 - » Plaques, trophies, commemorative items
 - » Honorary degrees
 - » Foreign Gifts and Decorations Act

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Expressly Prohibited Gifts

S Rule XXXV
H Rule XXV

- » Lobbyists, lobbying firms, and foreign agents are prohibited from making the following donations
 - » Entity controlled or maintained by Member or staff
 - » Charitable donation on basis of recommendation
 - » Member or staff legal defense fund
 - » Congressional conference or retreat
 - » Personal hospitality (except if personal friendship)

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New Senate Constituent Event Gift Rule Exception

S. 1

- » Senator, Senate officer or Senate employee may accept an offer of "free attendance" in the Member's home State at a conference, symposium, forum, panel discussion, dinner event, site visit, viewing, reception, or similar event provided by the sponsor of the event if
 - » The cost of the meal is less than \$50
 - » The event is sponsored by constituents (or group that consists primarily of constituents)
 - » The event will be attended primarily by at least 5 constituents - provided a registered lobbyist is not in attendance
 - » The Senator, officer, or employee participates in the event as a speaker or a panel participant, by presenting information related to Congress or by performing a ceremonial function; or, attendance at the event is appropriate to the performance of the official duties or representative function of the Member, officer or employee

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New Senate Constituent Event Gift Rule Exception (cont'd) ^{S. 1}

- » "Free Attendance" includes the provision of
 - » Local transportation
 - » Food, refreshments or entertainment
 - » Instruction materials furnished to all attendees and the waiver of all or part of conference or other fee
- » "Free attendance" does not include
 - » Entertainment collateral to the event or food and refreshments taken other than in a group setting with all or substantially all other attendees

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Aircraft Use by Members

<sup>S. 1/
H.Res. 6</sup>

» Use of private/corporate aircraft by Members

House	Senate
<ul style="list-style-type: none"> » Near total ban; prohibits Member/staff from using personal, official, or campaign funds to pay for the use of non-governmental airplane not licensed by FAA to operate for compensation or hire 	<ul style="list-style-type: none"> » Not banned outright; must pay market charter rate (pro-rated among congressional travelers only) for travel on private aircraft not certificated by FAA and required to be conducted under air carrier safety rules » Exception for government and immediate family planes

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Campaign Use of Aircraft

S. 1

- » Amends FECA to cover use of private/corporate aircraft by candidates

House Candidates	Senate Candidates
<ul style="list-style-type: none">» Limited to FAA certificated planes unless owned by candidate or immediate family member	<ul style="list-style-type: none">» Permits travel on private aircraft» Requires a Senate candidate to pay FMV, i.e., the normal and usual charter fare or rental charge for comparable plane flights, divided by the number of <u>candidates</u> on the flight, unless plane owned by candidate or immediate family member

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Travel Involving Lobbying Entities

H.Res. 6

- » House
 - » Members and staff may not accept travel from private entities that employ or retain lobbyists, except “one-day trips”
 - » The House makes an exception for colleges and universities
 - » Privately funded travel must be pre-approved by Committee on Standards of Official Conduct, based on committee guidelines
 - » Does not cover travel paid by Members’ Representational Allowance or House Committee Funds
 - » Member or staff may not be accompanied by a lobbyist on “any segment” of “one-day trip”
 - » Members must obtain a certification from the sponsor of the trip that a lobbyist did not plan, organize, request, or arrange the travel
 - » Very *de minimis* lobbyist involvement permitted

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Travel Involving Lobbying Entities (cont'd)

S. 1

» Senate

» Same, except

» Senate bill includes an exemption from the travel restrictions for **501(c)(3) organizations**

» Unlike the House, the Senate does not make an exception for colleges and universities

» Senate Ethics Committee will establish pre-approval standards

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Travel Involving Lobbying Entities (cont'd)

S. 1/
H.Res. 6

» Lobbyist involvement in trips

» Lobbyists can have no more than “*de minimis*” (“negligible or inconsequential”) involvement in planning, organizing, requesting one-day trip

» OK in House

» Lobbyist responds to trip sponsor’s request regarding which staff or Members have relevant interest in trip

» Not OK in House

» Lobbyist “solicits or initiates” exchange of information with trip sponsor

» We await Senate guidance

» However, House guidance permits lobbyist to be at destination

» Outright ban on lobbyist accompanying Member on any part of travel to and from the “one-day trip”

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Travel Rules

S. 1/
H.Res. 6

- » Committee pre-approval travel source certifications (among others)
 - » The trip will not be financed in any part by a lobbyist or agent of a foreign principal
 - » The sponsor either
 - » Does not employ or retain a lobbyist or agent and is not itself a lobbyist or agent
 - » Certifies that the trip is either a “one-day trip,” or the sponsor is 501(c)(3) organization (Senate) or university (House)
 - » The sponsor did not accept any funds directly or indirectly earmarked for the trip
 - » That the trip will not “**in any part**” be planned, organized, requested, or arranged by a lobbyist or agent
 - » The Member or staff person will not be inappropriately accompanied on the trip by a lobbyist or agent

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Trip Pre-Approval Standards

H.Res. 6

Trip Pre-Approval Standards	
House	Senate
<ul style="list-style-type: none"> » Connection between trip and official duties » Reasonableness of amount spent by sponsor » Relationship between event and officially-connected purpose » Direct and immediate relationship between source of funding and event 	<ul style="list-style-type: none"> » Stated mission of trip sponsor » Sponsor's prior history of congressional trips » Sponsor's other, non-trip related educational activities » Sponsor's track record with Ethics Committee » Consistency of trip length and itinerary with official purpose » Adequacy of trip's connection to official duties » Reasonableness of sponsor's cost » Direct and immediate relationship between source of funding and event » Other relevant factors

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Lobbying Disclosure

S. 1

- » Administrative and enforcement provisions
 - » Requires House and Senate to make all disclosure information publicly accessible via the Internet, and in a searchable format, with direct links to Federal Election Commission campaign finance reports
 - » Civil penalties for non-compliance with lobbying disclosure laws increase to \$200,000 (from \$50,000)
 - » “Knowingly, willfully, or corruptly” failing to comply with the Lobbying Disclosure Act – up to 5 years in prison
 - » Comptroller General to conduct random audits on annual basis

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Quarterly Lobbying Disclosure

S. 1

- » Effective for activity after January 1, 2008
 - » Reports to be filed electronically and now quarterly
 - » Due 20 days after end of quarter (down from 45)
 - » Halved thresholds
 - » Lowers registration thresholds to \$2,500 for lobbying firms and \$10,000 for in-house lobbying expenses
 - » Lowers the reporting of lobbying expenses to nearest \$10,000
 - » Must identify if client is state or local government or an agency or instrumentality controlled by state or local government
 - » Must disclose lobbyists' Executive or Legislative Branch employment back 20 years from first lobbying action
 - » Must include coalition information

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New Lobbying Registration Thresholds

Lobbyist/Lobbying Firm	Entity with Lobbyist Employees
<ul style="list-style-type: none"> » Two lobbying contacts » 20% of time engaged in “lobbying activities” over quarterly period » Client income from quarter expected to exceed \$2,500 for lobbying 	<ul style="list-style-type: none"> » Two lobbying contacts » 20% of time engaged in “lobbying activities” over quarterly period » Total expenses in connection with “lobbying activities” expected to exceed \$10,000 in quarterly period

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New Semi-Annual Report for Lobbying Organizations and Lobbyists

S. 1

- » All political committees established or controlled by reporting person
- » Federal political committees receiving contributions from the reporting person or its political committee aggregating over \$200 in the semi-annual reporting period
- » Donations by reporting person to entities not reporting as a Federal PAC for
 - » An event to honor a covered Legislative or Executive Branch official
 - » An entity named for, or in recognition of, a covered Legislative or Executive Branch official
 - » An entity established, financed, maintained, controlled, or designated as a beneficiary by a covered Legislative or Executive Branch official
 - » Costs of a meeting, retreat, or conference held by or in the name of a covered Legislative or Executive Branch official
- » Presidential library foundations and inaugural committees receiving contributions over \$200 from the reporting person or its political committee

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New Semi-Annual Certification for Lobbying Organizations and Lobbyists

S. 1

- » Certifier “has read and is familiar with” Senate and House gift and travel rules
- » Certifier “has not provided, requested, or directed a gift, including travel” to a Member or staff, with knowledge that receipt of gift would violate Senate or House gift and travel rules
- » Think Sarbanes-Oxley for lobbyists

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Lobbying Disclosure By “Certain Coalitions and Associations”

S. 1

- » Requirements apply to an “organization”
 - » LDA defines an “organization” as a “person or entity other than an individual”
- » Associations and other “organizations” must now disclose members who
 - » Contribute \$5,000 or more
 - » “Actively participate” in a substantial way in the planning, supervision, or control of coalition activities
 - » Mere donors and mere recipients of information and reports are not considered to actively participate
- » “Website safe harbor”
 - » No disclosure necessary if organization that would be identified as affiliated is listed on the coalition’s publicly accessible Internet website
 - » Does not apply to organizations that in “whole or major part” plan, supervise, or control coalition activities

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GAO Lobbying Disclosure Audits

S. 1

- » Comptroller General Audit of LDA Compliance
 - » Random audits
 - » Can request information, documents, and written answers
 - » No subpoena power but provides for congressional notification of non-compliance
 - » Periodic reports to Congress

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Bundling

- » Amends FECA to require a candidate's authorized committee, leadership PAC, or political party committee to disclose the name, address, and employer of each current registered lobbyist who has provided the committee with bundled contributions in excess of \$15,000 in a six-month period
- » Bundled means either
 - » Situation where lobbyist physically forwards contributions to a committee or
 - » Where contributors send contributions directly to committee but lobbyist gets credit from the committee and that credit is reflected in some form of record, designation or recognition
- » Covers only contributions credited to lobbyists

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Earmarks and Other Limited Benefits

S. 1/
H.Res. 6

- » Earmark (House)/Congressionally Directed Spending Item (Senate)
 - » “A provision or report language included primarily at the request of a Member or Senator providing, authorizing, or recommending a specific amount of discretionary budget authority, credit authority, or other spending authority for a contract, loan, loan guarantee, grant, loan authority, or other expenditure with or to an entity, or targeted to a specific State, locality or Congressional district, other than through a statutory or administrative formula-driven or competitive award process”
- » Limited tax benefits and tariffs

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Earmarks and Other Limited Benefits (cont'd)

H.Res. 6

House Rules	Senate Rules
<ul style="list-style-type: none"> » Requires public disclosure of the sponsors of earmarks, limited tax benefits, and limited tariff benefits » Defines earmarks, limited tax benefits, and limited tariff benefits » Prohibits trading earmarks for votes 	<ul style="list-style-type: none"> » Similar rules as House » Senate requires public disclosure 48 hours <i>in advance</i> of consideration of a bill containing such a provision » Prohibits a Senator from using his or her official position to request or aid in the passage of an earmark that would benefit the Senator, the Senator's family, or Senator's staff or staff person's family

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Earmarks and Other Limited Benefits (cont'd)

S. 1

» House and Senate rules

- » Any Member who requests an earmark or limited benefit in a bill (or accompanying report), or in any conference report, is required to provide a written statement to the Chairman and ranking minority Member of the Committee of jurisdiction, which includes
 - » The name of the Member
 - » In the case of an earmark, the name and address of the intended recipient or, if there is no specifically intended recipient, the intended location of the activity
 - » In the case of a limited benefit, the entity or entities reasonably anticipated to benefit, to the extent known to the Member
 - » The purpose of the earmark or limited benefit
 - » A certification that the Member or spouse has no financial interest in the earmark or limited benefit

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Post Employment Restrictions

S. 1

House	Senate	Executive Personnel
<ul style="list-style-type: none">» House Members are barred from lobbying the House for one year» No new restrictions on House staff	<ul style="list-style-type: none">» Prohibits Senators from lobbying the Senate or House for two years» Prohibits senior staff from lobbying for one year any Member or staff person of the entire Senate	<ul style="list-style-type: none">» Extends from one to two years the ban on very senior Executive Branch employees from engaging in communications with former colleagues and other officials with the intent to influence official action

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National Party Committee Events

S. 1

House Rules	Senate Rules
<ul style="list-style-type: none"> » Prohibits a House Member from attending a party at a national convention that is directly paid for by a lobbyist or entity that retains or employs a lobbyist » Exempts from the general prohibition attendance at events where the House Member is being honored "in his capacity as a candidate" for president or vice president 	<ul style="list-style-type: none"> » Same prohibition as House » Exempts from the general prohibition attendance at events where the Senator is being honored as "the party's presidential or vice presidential nominee or presumptive nominee"

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Miscellaneous Provisions – Ethics Trainings

S. 1/
H.Res. 6

House Rules	Senate Rules
<ul style="list-style-type: none"> » Requires the Committee on Standards of Official Conduct to offer training to Members and staff, and requires new staff to undergo training » Requires House staff to certify each year they have completed "appropriate" ethics training 	<ul style="list-style-type: none"> » Requires Senators and staff to complete ethics training

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Miscellaneous Provisions (cont'd)

S. 1/
H.Res. 6

» K Street Project Backlash

- » Prohibits a Member or Senator from influencing the employment decision of a private entity by taking or withholding, or offering or threatening to take or withhold, an official act, on the basis of a partisan political affiliation
- » S. 1 contains criminal penalties for violations
- » S. 1 criminal provisions not backward-looking

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Kelley Drye Can Help

- » Training and Standardization of Procedures
- » Tracking to Support Gift and Travel Certifications
- » Adjusting to Speedy Quarterly Filing
- » Implementing Semi-Annual Filing
- » Report Preparation Assistance
- » Representation in Comptroller General Audits
- » Ethics Committee and DOJ Trouble-Shooting

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